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No. 91-181

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

AGRO SCIENCE CO. AND BAVARO INVESTMENT CO.,
Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

R & D PARTNERS-82 AND DONALD D. SPEAR,
Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

ALFA MEDICAL RESEARCH ASSOCIATES AND MARC GELLER,
Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

SUPPLEMENT TO PETITION FOR WRIT OF CERTIORARI

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SUPPLEMENT TO PETITION FOR CERTIORARI

A Conflict Now Exists Between the Circuits:

On June 27, 1991, the United States Court of Appeals for the Sixth Circuit published its decision in Dean B. Smith, et ux. v. Comm'r, 937 F.2d 1089 (6th Cir. 1991). That decision reversed the Tax Court (91 T.C. 733) and ruled that in the Sixth Circuit the test for deductibility of research and experimental expenses under Section 174 is

(1) "Whether the transaction has any practicable effects other than the creation of income tax losses;

(2) that "inquiry (must) be conducted from the vantage point of the taxpayer at the time the transactions occurred, rather than with the benefit of hindsight."

(3) Profit motive requires only the honest hope for economic gain and not a reasonable expectation that such gain will be realized.

Based upon these principles, the United States Court of Appeals for the Sixth Circuit

determined that a research and development project created deductible and accruable expenses based upon a cash payment equal to 1/16 of the deduction with the balance paid with a 25-year installment note. This was so, notwithstanding the fact that 70% of the proceeds would go to "promotions, attorneys or network entities."

A companion test case, Karr v. Comm'r, was appealed to the United States Court of Appeals for the Eleventh Circuit and was affirmed on the same facts. 924 F.2d 1018 (11th Cir. 1991).

The application of the rules announced by the United States Court of Appeals for the Sixth Circuit would have required a reversal of the Tax Court in the instant case. The Tax Court's ruling was based upon virtually identical factual and legal conclusions as those rejected by the Court of Appeals in the case of Smith v. Comm'r.

Therefore, a conflict exists between the Circuits which should be resolved by the United States Supreme Court.

Respectfully submitted,

Joel Held

Dated: September 13, 1991

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